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Notes on Arbitration Treaty

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with the compliments
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NOTES ON THE ARBITRATION TREATY of

BY
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I.

The arbitration treaty has provoked the popular discussion, which was the evident purpose of its publication in advance of action by the Senate. The treaty has been, generally, most favorably received, though there is some opposition, due in part to inveterate prejudice and mistrust, but chiefly to misapprehension of the real effect of the stipulations. The serious opposition is that which has developed in the Senate, and there is an apprehension lest it prove strong enough to kill the treaty outright, or mutilate it, or wear it out by delay. I shall note some of the chief provisions of the treaty and endeavor to confute certain objections which are urged against them.

The treaty provides for three tribunals. Questions involving territorial claims shall be submitted to an extraordinary tribunal, composed of three arbitrators chosen by the President from the Supreme or Circuit Courts, and three chosen by the Queen from the Supreme Court of Judicature or the Judicial Committee of the Privy Council. (Where a case concerns a State or Territory of the Union or a British Colony a judicial officer of such State or Territory, or Colony may be chosen as one of the arbitrators.) The award of this tribunal shall be final when rendered by a majority of not less than five to one. An award rendered by less than the prescribed majority shall be final unless either party shall, within three months, protest that it is erroneous, in which event it shall be invalid.

Pecuniary claims which do not exceed £100,000, nor involve territorial claims, shall be dealt with by an ordinary tribunal

composed of two jurists of repute, one being named by each of the parties, who shall choose an umpire within three months. If they fail to agree, the appointment of an umpire shall devolve upon the Supreme Court of the United States and the Judicial Committee of the Privy Council, and if these bodies do not agree within three months the King of Sweden shall appoint. The award of a majority of the members shall be final.

Pecuniary claims which shall exceed £100,000 and all other arbitrable questions, except those involving territorial claims, shall be submitted to the ordinary tribunal whose award, if unanimous, shall be final. If not unanimous either party may appeal within six months to a tribunal which shall be composed of five jurists of repute (no one of whom shall have been a member of the original tribunal), two to be named by each party and the fifth to be selected according to the provisions for the selection of an umpire for the ordinary tribunal. The award of the majority of the members of the appellate tribunal shall be final.

Complaint has been made that a king should be invested with the ultimate power to choose an umpire in certain cases. If this complaint is born of a timid and provincial republicanism it may be cured by reviving the liberal spirit which has moved us in times past to request the arbitral offices, personal or appointive, of the Emperors of Germany, Brazil, and France, the Kings of Italy and the Netherlands and the King of the Belgians. The complaint is really an artful stab at the cause of arbitration when it is coupled with the criticism that a European is to choose an umpire in controversies between the United States and Great Britain. Should we declare that the umpire must be an American because of his presumed bias in our favor, for that would be the meaning of the declaration, we would forfeit our reputation for fair dealing. The suggestion that an American should umpire what are called American cases and a European what are called European cases is both absurd and disingenuous. What of controversies arising from acts on the high seas? What was the nationality of the Alabama case? But, apart from the practical impossibility of segregating international controversies into national or continental groups, no greater blow could be struck at

arbitration than by an attempt to insure the decision of so-called American questions in favor of the United States, and of so-called European questions in favor of Great Britain.

The treaty provides that, before the close of the hearing upon a claim submitted to the ordinary or the appellate tribunals, either party may move the tribunal to decide that "the determination of such claim necessarily involves the decision of a disputed question of principle of grave general importance, affecting the national rights of such party as distinguished from the private rights of which it is merely the international representative." If the tribunal so decides its jurisdiction shall cease and the claim shall be dealt with by an extraordinary tribunal.

It is objected that the tribunal might decide against the moving party and thus retain jurisdiction in a case after one of the parties had openly and properly questioned its competency. But the clause is so worded that the tribunal would be morally bound to relinquish the case unless the objection was evidently untruthful or frivolous. This apprehension of an abuse of power is certainly not warranted by precedent. Indeed in several important cases we have desired the arbitrators to assume greater responsibilities than they were willing to undertake. The natural tendency of an umpire is to minimize rather than magnify his powers. He is the friend of both parties, chosen for his impartiality, and he is justly apprehensive that a refusal to concede what either party has a right to request will add to the difficulties of his sufficiently delicate and responsible position.

II.

By the first article of the treaty the parties "agree to submit to arbitration, in accordance with the provisions and subject to the limitations of this treaty, all questions in difference between them which they may fail to adjust by diplomatic negotiation." Upon reading the whole treaty we find that the "questions in difference" include by name "all pecuniary claims;" "all territorial claims," which are further defined to include "all other

claims involving questions of servitude, rights of navigation, and of access, fisheries, and all rights and interests necessary to the control and enjoyment of the territory claimed by either of the high contracting parties." These definitions define themselves sufficiently. They indicate questions which our government has arbitrated and has prevailed upon others to arbitrate. According to the terms of the treaty they are within the exclusive jurisdiction of the extraordinary tribunal, whose award is not conclusive unless it is made with the concurrence of at least two out of the three American judges.

The treaty provides further for the arbitration of "all other matters in difference in respect of which either of the high contracting parties shall have rights against the other under treaty or otherwise."

We will reserve the subject of rights by treaty for special discussion and consider the general charge that the clause renders us liable to submit to arbitration questions which we should invariably decide for ourselves, come what may—especially questions involving the Monroe doctrine. It has been urged that non-arbitrable cases should be definitely excepted from the purview of the treaty, but a just appreciation of the letter and spirit of the document will show that any written exception would be superfluous and possibly embarrassing, because an exception specific enough to be intelligible might be so construed as to admit, by implication, undesirable questions not expressly excluded. A master-word in an instrument is far more weighty than a dozen petty ones interlined in a spirit of cunning precaution. The master-word of the arbitration treaty is "rights," and this word interpreted by American and English jurists will better indicate the existence and definition of non-arbitrable cases than any painstaking classification. Had the treaty prescribed that all "complaints" made by one party against the other should be arbitrable it might have opened the door to vexatious and fruitless litigation, but the use of the word "rights" places "the questions in difference" upon an intelligible and definite plane. When one has a "right" against another the other is burdened with a correlative duty, and in this correlation we find the basis and the essence of law. Therefore, the scope of the treaty is not definable

by either party according to its whims, its sentiments, its prejudices, nor necessarily by its real concern in the actions of the other. A request for arbitration, to be necessarily accepted, must be founded upon an alleged failure of duty—that is, a breach of law.

It is true that the law in question is not like the rule prescribed by a sovereign state and enforced within its jurisdiction by penalties. It is the law of nations, which is neither declared nor enforced by stated authority; which rests upon the formal agreement of states expressed in treaties, upon a mutual observance of self-imposed duties, and upon a common recognition of the applicability of certain principles of justice to international affairs—a law incomplete in principle and imperfect in obligation, yet steadily gaining authority within the broadening limits of its domain.

The limitations of the word "rights" will be suggested by anticipating the effect of a request for arbitration preferred by one party to the other.

It should be premised that the treaty is the source, not the subject, of arbitration. It is therefore to be construed authoritatively by the parties themselves, each relying upon its own construction and justifying its action by good faith. Further the treaty is not a code of arbitration—a particular declaration of principles and procedure. The negotiators have wisely drawn the treaty on large lines, leaving many important matters to be arranged by the parties should occasion arise. It follows from these premises that a request to arbitrate is not necessarily accepted, and ~~nor~~ that an acceptance is conditional. The question must be an arbitrable one, and its statement must be agreed upon in order to confer jurisdiction on the court.

The question may be one wherein the law is settled and the facts are in controversy, as, for example, a disputed claim to land or something else which is recognized as property by law. In such a case a request for arbitration should be accepted.

A question may be raised wherein the facts may or may not be disputed, but the conclusions of law are in controversy. Thus,

in the fur seal arbitration, the fifth point submitted to the tribunal was this: "Has the United States any right and if so what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three mile limit?" The tribunal decided that the United States had no rights in the seals found in the high seas, and based its judgment on what it deemed to be the recognized law of nations with regard to property in animals and to the high seas. I do not criticise the conclusions of the court in point of law, nor its determination that it lacked authority to assume powers which would have enabled it to insure the protection of the seals, but the award has not prevented the ruin of a valuable property, and has disclosed a grievous shortcoming in the law of nations. Should a projected arbitration under the treaty seem likely to lead to such unfortunate results it would, I believe, be the duty of the parties to present the case in such form, or invest the tribunal with such powers, as to insure a full adjudication on the real merits of the case.

The facts in a case may or may not be disputed, but although it may be evident that the case is of such a nature that it might be properly brought within a rule of international law, it may be equally evident that a governing rule has not obtained recognition. The injuries inflicted on our commerce by Confederate cruisers from British ports constituted, according to our definition of the duties of neutrals, a just claim against Great Britain. Our definition had long been maintained by American publicists, but had not been recognized by other powers and thus was not incorporated in international law. However, Her Majesty's government, being moved by a desire for a peaceful settlement and realizing that certain of our views as to the duties of neutrals were meritorious, agreed with us that an arbitral decision should conform to certain conventional rules of law. Hence, in Article VI. of the Treaty of Washington of 1871 we read: "In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties, as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith as the arbitrators shall determine to have been applic-

able to the case." Then follow the rules, which the parties further agree shall be observed by them in future.

If, during the term of the arbitration treaty, one of the parties shall allege that it has sustained a damage, and the question is not, yet ought to be, fully arbitrable under a principle of international law, the parties should, if possible, repeat their action in the Alabama case and enrich the law of nations by agreeing upon a governing rule. Failing to agree they may empower arbitrators to sit as legislators and declare the rule that shall govern the case. But the treaty does not create or enlarge "rights," nor does it compel the parties to do so. It simply prescribes the recognition of existing rights, and yet one of its greatest possibilities is the opportunities it may afford for enlarging the law of nations.

Thus far our cases are within the present or prospective limits of international law. The next case carries us beyond them. We will assume that one of the parties requests the arbitration of a question of such a nature that a statement of the facts does not suggest rights and duties recognized by law, nor even recognizable. For example, should the United States assume an active concern in the Turkish question it is conceivable that British interests might be seriously affected, yet the resulting question in difference would be clearly non-arbitrable. Should Great Britain assert a "right" in the premises it would be silenced by our demand to suggest a correlative duty. We have passed from the domain of rights into that of policy. Now the policy of a government may relate to any subject or to any country. The "rights" of a government are based on its jurisdiction over persons and property, unless indeed a policy has been made the subject of treaty stipulation. Therefore, "questions in difference" having their origin in the attitude or relation of either Great Britain or the United States to another state are beyond the purview of a treaty for the arbitration of "*rights* which either party may have against the other."

This proposition excludes the possibility of the Monroe doctrine being dragged into court as surely as though the treaty excepted it in terms. That doctrine denotes our attitude towards the states of the American continent, and whatever rights and duties it may involve have exclusive relation to the parties im-

mediately concerned. We owe no duty to Great Britain in the matter, for the doctrine simply affirms our interest in the integrity of American states, not a design against the integrity of British colonies.

But it is argued that if the Monroe doctrine is really excepted from the operation of the treaty, what harm can there be in saying so? Should the treaty thus amended be returned to Her Majesty's government might they not reason that by accepting it they would accord a definite standing to a doctrine that they have never formally recognized? We have just gained so substantial a recognition of the Monroe doctrine by the action of Her Majesty's government in the Venezuelan matter that it would be a mistake in diplomacy to afford that government an opportunity to tear up a treaty because it named the doctrine. But should Her Majesty's government make no objection to the naming of the doctrine they would probably request its definition so that they might understand the real effect of the exception. Such a definition must, of necessity, be so vague as to be worthless for treaty purposes, or so particular that it would prescribe the position of the United States on this continent by metes and bounds. No greater injury could be done to the admirable doctrine of President Monroe than to define it dogmatically to Great Britain and therefore, in effect, to all the world.

III.

A specific objection to the arbitration treaty, and one that is pressed with considerable vigor, is that by agreeing to arbitrate all questions in which either party shall have rights against the other "under treaty," we will be prevented from dealing at our pleasure with the Clayton-Bulwer treaty.

By this treaty, signed in 1850 by the United States and Great Britain, the contracting states agreed, among other things, that neither would "ever obtain or maintain for itself any exclusive control over said ship canal," that is, a canal "between the Atlantic and Pacific oceans by the way of the river San Juan de Nicaragua and either or both of the lakes of Nicaragua or Man-

agua;" and further that neither would "ever erect or maintain any fortification commanding the same or in the vicinity thereof, or occupy or fortify or colonize or assume or exercise dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America;" and they further agreed "to guarantee the neutrality" of the said canal, and "to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America."

American statesmen have asserted that the treaty is voidable at the instance of our government, and this opinion has been officially made known to Her Majesty's government through letters addressed to our ministers in London by Secretaries Blaine and Frelinghuysen. The reasons for this opinion are stated by Secretary Frelinghuysen in a letter to Mr. Hall, our minister to Central America, dated July 19, 1884. "The Clayton-Bulwer treaty was voidable at the option of the United States. This, I think, has been demonstrated fully on two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast." Our government has not, however, exercised its asserted right to repudiate the Clayton-Bulwer treaty, and any action it might take in contravention of its stipulations would be arbitrable under the terms of the treaty now in the hands of the Senate. The right to repudiate a treaty perpetual in terms is only justifiable by the fault of the other party, or by the extinction or cessation of the moving cause, or, perhaps, by so radical a change in the conditions out of which the treaty grow as to make it plain that the obligations have become essentially different—in fine, a righteous avoidance of an international obligation, is really but the recognition of its voidability in law. When we consider that an unjust recession from an obligation is dishonorable, and that a just one is susceptible of proof, I fail to see why we should mutilate the arbitration treaty, or refuse to ratify it, because we might be obliged to submit our proofs to an impartial tribunal. Besides, even assuming that the ordinary tribunal provided by the treaty would have original jurisdiction of the question, it

could doubtless be removed to the extraordinary tribunal of six in which two of the American judges must concur in a binding decision. Indeed, it may be suggested that this extraordinary tribunal would have original jurisdiction of a question as to the Clayton-Bulwer treaty, for one of the main grounds of our contention that it is voidable is the alleged unlawful possession by Great Britain of the territory known as British Honduras. When this point is raised, as it certainly would be, the validity of a territorial claim is in question, and by the words of the treaty the extraordinary tribunal is the only one competent to consider such a claim.

After all, is there not something of affectation in an assertion of the momentous importance of the canal project as an immediate question? For years the strip of land between the oceans has magnetized statesmen and engineers, yet it is as tantalizing as ever. Tons of paper have been used for the recording of surveys, treaties, concessions, contracts—and we have nothing but paper canals. One project only has advanced beyond the stage of the prospectus—the Panama ditch, full of corpses, money, and reputations—the financial scandal of the century. I believe that brains and money will yet force a way across the Isthmus, but I insist that to all appearances our government is not confronted with a crisis in the canal question. As long as we do not repudiate the Clayton-Bulwer treaty the British government cannot assume exclusive control over an inter-oceanic canal, nor obtain any interest in one unless we choose to join. Should this treaty be abrogated we fall back upon the non-arbitrable Monroe doctrine. The arbitration treaty is for the term of five years, and should the American people come to view the canal as evidently feasible, and its exclusive control of more importance than the maintenance of arbitral relations with Great Britain, our government can give the prescribed twelve months notice, terminate the arbitration treaty, and deal with the canal question according to its own judgment.

IV.

The Senate Committee on Foreign Relations is said to have reported the following amendments to the arbitration treaty: It recommends that each party shall appoint two jurists upon the ordinary tribunal instead of one, thus enlarging the court to five members. This recommendation suggests a formal alteration that is not open to special objection.

A further amendment strikes out the provision giving to the King of Sweden the power to select an umpire in case the Supreme Court and the Judicial Committee of the Privy Council shall fail to agree upon one. This amendment should not prevail. Neither party has any reason to mistrust the ability and impartiality of an umpire because he is selected by the King of Sweden, and when the people of the United States and Great Britain express through their proper representatives a wish to arbitrate a question they should not be balked or hampered simply because two judicial bodies cannot agree upon an umpire.

The most important amendment is an addition to Article I. This article recites that the parties "agree to submit to arbitration, in accordance with and subject to the limitations of this treaty, all questions in difference between them which they may fail to adjust by diplomatic negotiation," and it is proposed to add, "But no question affecting the foreign or domestic policy of either of the high contracting parties, or the relations of either to any other state or power, by treaty or otherwise, shall be a subject for arbitration under this treaty, except by special agreement." (A further amendment permits either party to take any case, except a territorial claim, out of court before the close of the hearing by declaring that it necessarily involves the decision of a question made non-arbitrable by the amendment we have just mentioned. This is the logical pendant to the above amendment and must stand or fall with it.)

So far as this amendment is intended to insure the immunity

of the Monroe doctrine it is superfluous, for, as we have seen, the questions involved in that doctrine do not fall within the "rights" which alone are within the purview of the treaty. So far as the amendment may be intended to free our hands for the immediate promotion of a canal project it is mischievous. We should not mutilate the arbitration treaty in order to secure the privilege of guaranteeing $100,000,000 of bonds of a company whose surveys have been questioned by a commission of government engineers, and whose very power to contract with our government is formally denied by a state whose concessions it must rely upon in order to carry on its undertaking.

Should the amendment prevail the parties would agree to arbitrate "all questions in difference between them," that is to say, "pecuniary claims," "territorial claims," and "all other matters in difference in respect of which either of the high contracting parties shall have rights against the other by treaty or otherwise," *provided* that the question shall not affect any "policy" of either nation. "Policy" is to usurp the place of "rights" as the master-word of the treaty. The loosest word in the vocabulary of the publicist is to dominate the most exact one. "Policy" expresses but one idea—the will of the nation. It may be moral or immoral, bold or cowardly, peaceable or warlike. It may be in accord with the rules of international law or contemptuously disregard them. The question is not what a "policy" is, but what is it not. The word as used is unfit for publication in a treaty, for a treaty should bind to something. Should "policy" qualify "rights" either party could refuse any request for arbitration with perfect propriety by asserting with truth that its "policy" was involved.

The amendment interpolates a suggestion wholly foreign to the true theory of arbitration. I doubt whether the most Quakerish advocate of peace has ever contemplated the possibility of an independent nation submitting its domestic policies—that is, its ideas and plans in relation to home affairs expressed by legislative and executive acts—to the judgment of an international tribunal. Yet the amendment not only suggests this impropriety, but apparently opens the way for its possible realization by investing the parties with power to arbitrate questions affecting such policies "by special agreement."

What is the nature of the " special agreement? " If it is to be made by the President with the advice and consent of the Senate it should be termed what it really is—a " treaty." Yet the arbitration treaty, thus amended, would be simply a model which the powers that be commend, but cannot impose, as a guide to such arbitrations as their successors may see fit to engage in. The rejection of this weak conclusion involves the acceptance of a vicious one. If the " special agreement " is an executive act, as it appears to be, it is within the sole competency of the President, who is therefore empowered to arbitrate questions of policy, which by the apt words of the original draft, are absolutely excluded from arbitration.

But it is now reported that the Committee has excluded the vicious conclusion and adopted the weak one in an exaggerated form by substituting for the original amendment a provision requiring the participation of the Senate in any negotiation for an arbitration—that is to say, each arbitration shall be the subject of a treaty. If the report is true the amended document may be thus construed: " The United States of America and Her Majesty the Queen of Great Britain and Ireland, being desirous of consolidating the relations of Amity which so happily exist between them, and of consecrating the principle of International Arbitration," hereby agree to try to agree upon treaties for the arbitration of such questions as are herein suggested before such tribunals as are herein recommended, and they hope that the desire for arbitration, so fervently expressed in the preamble, may be actively expressed by each party in respect of the same question at the same time. Such a document is not a treaty, even in intention.

V.

A concurrent resolution agreed to by the Senate on February 14, 1890, and by the House of Representatives on April 3, of the same year recites: " That the President be and is hereby requested to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differ-

ences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means." In 1893 Secretary Gresham opened negotiations with Her Majesty's government looking to a general arbitration treaty which were interrupted by his death. Upon the adjustment of the Venezuela controversy negotiations were resumed, and their results appear in the treaty. The Senate has now the privilege of confirming the acceptance of an invitation which it extended seven years ago.

The only question suggested by the treaty is whether we wish to maintain arbitral relations with Great Britain—whether we really desire to invoke the law in questions admitting of legal solution? If we do, the treaty as sent to the Senate is the lightest compact that nations of our power and intelligence should make if they intend to assure each other and the world of their purpose to enter into arbitral relations. A document less binding would be little more than a profession of faith in the beauty of arbitration with a reserved right of recantation should either party fear an adverse decision in an important case.

Morristown, N. J., February 15, 1897.